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No. 94-514

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL E. GAUDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Respondent does not challenge the key points underlying our submission that, in a prosecution for false statements under 18 U.S.C. 1001, the materiality of the statements is determined by the judge rather than the jury. Specifically, respondent does not dispute that materiality has historically been determined by the judge rather than the jury in prosecutions for perjury. Nor does he dispute that this Court relied on that historical practice in *Sinclair* v. *United States*, 279 U.S. 263 (1929), and *Kungys* v. *United States*, 485 U.S. 759, 770 (1988), to hold that materiality was a question of law to be decided by the court under statutes analogous to perjury. Finally, he does not dispute that Section 1001, like the statutes at issue in *Sinclair* and

Kungys, is analogous to perjury insofar as it prohibits false statements to public entities.

Respondent nonetheless argues that materiality under Section 1001 must be determined by the jury, for essentially three reasons. First, he argues that materiality is determined by the jury in certain actions involving false statements to private entities. Second, he argues that this Court failed in either *Sinclair* or *Kungys* to consider the fundamental principle that a criminal defendant is entitled to have the jury find every fact necessary to constitute the charged offense. Finally, he argues that, because materiality is an essential element of the false statement offense proscribed by Section 1001, the Constitution requires it to be determined by the jury. None of respondent's arguments undermines our submission that the resolution by the court of the materiality of false statements to public officials is constitutional.

1. In our opening brief, we argued that materiality has historically been treated as an issue of law to be decided by the judge rather than the jury in prosecutions for perjury. U.S. Br. 16-21. To meet that argument directly, respondent would be required either (1) to dispute our account of the historical treatment of materiality in perjury prosecutions, or (2) to explain why it should be disregarded in interpreting Section 1001. Respondent does neither.

Instead, respondent argues that "'materiality' is essentially a 'fact-bound' inquiry." Resp. Br. 3. In support of that argument, he relies on the Ninth Circuit's analysis in this case, see *id.* at 5 (quoting Pet. App. 17a), and on cases decided in "other contexts," besides perjury prosecutions, in which materiality is determined by the jury rather than the

court, Resp. Br. 7. The Ninth Circuit's analysis is flawed, however, and the case law on which respondent relies is inapposite.

a. In the passage of the Ninth Circuit's opinion quoted by respondent, the court stated that materiality is a "fact-bound" inquiry under Section 1001 for two reasons specific to this case: (1) that "[o]ne cannot look at * * * a particular statute or regulation to determine what would affect the decision of the [Department of Housing and Urban Development (HUD)] to insure a[] [Federal Housing Administration (FHA)] loan," but instead "[i]t was necessary to take testimony of department officials" to make that determination; and (2) that some of the amounts on the HUD loan forms that respondent falsely represented would be paid to, or paid by, the strawbuyers "were trivial." Pet. App. 17a.

The Ninth Circuit erred by attaching importance to the fact that a HUD official testified in this case. See also National Ass'n of Criminal Defense Lawyers (NACDL) Amicus Br. 5 (emphasizing "testimonial" nature of evidence). The official's testimony concerned the manner in which applications for FHA-insured loans are processed. See Pet. App. 5a; see also 2 Tr. 442. The same type of information may often be set forth in regulations or agency publications. Cf., *e.g.*, *United States* v. *Arch Trading Co.*, 987 F.2d 1087, 1095 (4th Cir. 1993) (relying on regulation to determine that defendant's false statement to Department of the Treasury was material). The source of the information does not alter its character as a description of the agency's lawful functions. That the information was, in this case, introduced through testimony rather than agency documents does not indicate that materiality is a

factual issue to be determined by the jury in prosecutions under Section 1001.

The Ninth Circuit also erred by relying on the "trivial" nature of the amounts of money involved in some of respondent's misrepresentations. Pet. App. 17a. As the dissent below explained, "[t]he proper question is whether false entries on a key line of a government-approved loan application have 'a natural tendency to affect' the agency's decision, regardless of the amount in question." *Id.* at 41a (Kozinski, J., dissenting). That question calls for "a generalized determination * * * that does not vary significantly with the facts of each individual transaction." *Id.* at 42a-43a.

As we explain in our opening brief, the Ninth Circuit's fundamental error was its view that materiality may be decided by the court, rather than the jury, "[o]nly if it can be said that there is *no* factual component to the determination of materiality." Pet. App. 13a (emphasis added); see U.S. Br. 42-43. As respondent recognizes, however, the classification of an issue as one of law, to be decided by the court, or one of fact, to be decided by the trier of fact, may be "as much a matter of allocation as it is of analysis." Resp. Br. 35 n.18 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 113-114 (1985)). That a determination of materiality may entail assessment of the facts means only that it "falls somewhere between a pristine legal standard and a simple historical fact." *Miller*, 474 U.S. at 114. It does not invalidate history's allocation of materiality determinations to the judge in settings analogous to this case.

b. Respondent contends that materiality should be determined by the jury in prosecutions under Section

1001 because materiality is a jury question in "other contexts" besides perjury prosecutions. Resp. Br. 7. Respondent's reliance on the treatment of materiality in those other contexts is misplaced.

The other contexts discussed by respondent involve misrepresentations or concealments directed at private, rather than public, entities. Respondent discusses the materiality requirement of the federal provisions prohibiting securities fraud, 15 U.S.C. 77q(a)(2) and 78j(b) (Resp. Br. 8-14); mail fraud, 18 U.S.C. 1341, wire fraud, 18 U.S.C. 1343, and bank fraud, 18 U.S.C. 1344 (Resp. Br. 15-19); and "[t]he question of materiality in cases concerning recision of insurance coverage based on material misstatements or omissions" (Resp. Br. 19; see also *id.* at 19-21). The materiality requirement in those contexts is defined by reference to the possible effect of a misrepresentation or concealment on a reasonable person. For example, a fact omitted from a proxy solicitation is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); see also *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988) (adopting *TSC* standard for Securities and Exchange Commission (SEC) Rule 10b-5, 17 C.F.R. 240.10b-5).[1]

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[1] See also Resp. Br. 8 (pattern jury instruction for materiality in actions for securities fraud), 14 (quoting materiality standard for civil action under SEC Rule 14a-9, 17 C.F.R. 240.14a-9, adopted in *TSC*), 17-18 (pattern jury instruction for materiality in actions for mail, wire, and bank fraud), 19 (quoting *M'Lanahan* v. *Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 188-189 (1828) (materiality standard for actions concerning misrepresentation or concealment in insurance

When materiality is based on the response to a set of facts of a reasonable private person, it is "analogous" to the negligence determination in tort actions, which also requires application of a reasonable person standard. *TSC*, 426 U.S. at 450 & n.12. The determination of negligence in tort actions is assigned to the jury, rather than the judge, because of the jury's "unique competence" to decide how a reasonable person would act. *Ibid.*; see also, *e.g.*, *Railroad Co.* v. *Stout*, 84 U.S. (17 Wall.) 657, 663-664 (1873); J. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 225-228, 252-253 (reprint 1969) (1898); S. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal. L. Rev. 1867, 1876-1877 (1966).

The jury's "unique competence" to apply the reasonable person standard in negligence cases and other actions involving the conduct of private parties does not justify assigning the materiality deter-

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contracts)); see also, *e.g.*, *SEC* v. *Maio*, Nos. 94-1233 & 94-1234, 1995 WL 117091, at *12 (7th Cir. Mar. 21, 1995) (discussing materiality requirement for violations of SEC Rules 10b-5 and 14e-3, 17 C.F.R. 240.14e-3); *SEC* v. *Steadman*, 967 F.2d 636, 643 (D.C. Cir. 1992) ("general definition of materiality under federal securities laws" refers to importance of omitted or misrepresented fact to "reasonable shareholder"); 22 J. Appleman, *Insurance Law & Practice* § 13041, at 338 (rev. ed. 1979) (sample jury instruction on materiality standard, summarized as "whether responsible, careful and intelligent insurance underwriters would have recommended insurance" based on misrepresentations by applicant); 1 S. Marshall & J. Condy, *A Treatise on the Law of Insurance* 467 (2d ed. 1810) ("Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material.").

mination to the jury in prosecutions under Section 1001 and other statutes involving false statements to public entities. Under those statutes, materiality is not based on a reasonable private person standard. It is instead tied to the legal responsibilities of the particular governmental decisionmaker to which the false statement was addressed. As the Second Circuit has explained:

> Where a false statement is made to a public body or its representative, materiality refers to the impact that the statement may reasonably have on the ability of that agency to perform the functions assigned to it by law. The question is not what effect the statement actually had; its actual effect would plainly present an issue of fact. The question is rather whether the statement had the potential for an obstructive or inhibitive effect. A consideration of this potential requires an analysis of the responsibilities of the public agency—responsibilities that are assigned by law—and analysis of the relevance of the statement to those responsibilities. Both relevance and the nature of a duty are traditionally questions of law to be decided by the court. Perforce the interrelationship of these two legal questions is a question of law.

United States v. *Greenberg*, 735 F.2d 29, 31 (1984).

The classic definition of materiality in a Section 1001 case is whether the concealment or misrepresentation "has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys*, 485 U.S. at 770 (internal quotation marks omitted). The materiality requirement in most contexts indicates

that the misrepresented or concealed fact would have had some influence on the decisionmaker, even though the fact need not have actually affected the decision in question. But what is distinctive about the materiality requirement in statutes prohibiting false statements to public officials is that the decisions of those officials are governed by legal requirements, rather than what a reasonable private person may have considered important.

Thus, materiality depended in this case on the potential effect of respondent's misrepresentations on HUD's discharge of its official responsibilities, rather than on their significance to any particular individual in that agency. See Resp. Br. 1 (respondent disputed whether his misrepresentations were of "significance to FHA"); see also Pet. App. 17a (recognizing that materiality depended on "what would affect the decision of the HUD to insure an FHA loan"); cf. *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986).

In sum, although determinations of "materiality" are made in actions involving false statements to private entities and in actions involving false statements to public entities, the character of the determination in the two settings differs. In actions involving private entities, materiality is based on a reasonable person standard that juries have long been considered competent to apply. In actions involving public entities, materiality is based on the possible impact of a misrepresentation or concealment on the legal duties of the entity, a determination that judges rather than juries are competent to make. Because

this case arises in the second setting, respondent's reliance on case law in the first setting is misplaced.[2]

2. Respondent challenges the government's reliance on *Sinclair* and *Kungys*, asserting that "a growing number of recent decisions" have declined to follow the "antiquated dictum of *Sinclair*" and the "more recent dictum in *Kungys*." Resp. Br. 21, 26. As we show in our opening brief, however, the trend is in the opposite direction. Every regional court of appeals except the Ninth Circuit has held that materiality is determined by the judge in prosecutions under Section 1001. See U.S. Br. 22 & n.15. Moreover, numerous courts of appeals, including the Ninth Circuit, have reached the same conclusion for other federal statutes proscribing false statements to public entities. See *id.* at 30 n.22. Appellate courts in at least 20 States have reached that conclusion with respect to analogous state statutes. See *id.* at 29 n.21; see also *State* v. *Sands*, 467 A.2d 202, 215-216 (N.H. 1983).[3]

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[2] Respondent asserts (Resp. Br. 14, 18) that the materiality determination may be equally "complex" whether a case involves a false statement to a private entity or one to a public entity. As we explain in our opening brief and in the text, pp. 8-9, *supra*, however, it is the nature of the determination, rather than its complexity, that is relevant in deciding whether the determination should be made by the judge or the jury. U.S. Br. 43-44.

[3] In addition, several States provide by statute that the materiality of an allegedly perjured statement is a question of law to be determined by the court. See, *e.g.*, Ala. Code § 13A-10-100(b)(2) (1984); Ariz. Rev. Stat. Ann. § 13-2701(1) (1989); Ark. Code Ann. § 5-53-101(a)(2) (Michie 1993); Colo. Rev. Stat. § 18-8-501(1) (1986); Fla. Stat. Ann. § 837.021(2) (West 1994); Haw. Rev. Stat. § 710-1000(9) (1985); Ky. Rev. Stat. Ann. § 523.010(1) (Michie/Bobbs-Merrill 1990); Me. Rev. Stat. Ann. tit.

To counter that overwhelming body of case law, respondent identifies only three decisions—two by state supreme courts, and one by a federal district court. See Resp. Br. 23-26 (discussing *United States* v. *Taylor*, 693 F. Supp. 828, 839 (N.D. Cal. 1988); *State* v. *Anderson*, 603 A.2d 928, 932-935 (N.J. 1992); *Commonwealth* v. *McDuffee*, 398 N.E.2d 463, 467-470 (Mass. 1979)). Although those decisions hold that materiality is determined by the jury under a statute proscribing false statements to a public entity, they provide only limited support for respondent's position. *Taylor* arose in the Ninth Circuit and is based on the same erroneous precedent of that court as the decision below. 693 F. Supp. at 833-835. *Anderson* is based on a state, not the federal, constitution. 603 A.2d at 935. Finally, *McDuffee* is based largely on the view that "[e]arly English case law presents a split of opinion as to whether the issue of materiality should be treated as a question of law." 398 N.E.2d at 467. We show in our opening brief that that view is mistaken, and, significantly, respondent does not challenge that showing. See U.S. Br. 16-21.

The other two decisions cited by respondent provide no support for his position. See Resp. Br. 21-22, 25-26 (discussing *United States* v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992), and *People* v. *Hedgecock*, 795 P.2d 1260 (Cal. 1990)). *Staniforth* involved a prosecution for bank fraud under 18 U.S.C. 1014. 971 F.2d

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17A, § 451(2) (West 1983); Mont. Code Ann. § 45-7-201(3) (1993); Neb. Rev. Stat. § 28-915(3) (1989); N.H. Rev. Stat. Ann. § 641:1(II) (1986); N.D. Cent. Code § 12.1-11-04(1) (1985); 18 Pa. Cons. Stat. Ann. § 4902(b) (1983); Tex. Penal Code Ann. § 37.04(c) (West 1994); Utah Code Ann. § 76-8-501(2) (1995); see also U.S. Br. 18 (citing similar British statute).

at 1358. *Hedgecock* involved a perjury prosecution under a state political reform law designed to inform voters about the financial affairs of elected officials. 795 P.2d at 1264-1265. The court in each case recognized that the materiality standard under such statutes is different from the materiality standard under statutes proscribing false statements to public entities. *Staniforth*, 971 F.2d at 1358; *Hedgecock*, 795 P.2d at 1265-1266. Accordingly, the court in each case concluded that case law concerning the latter type of statute—including this Court's decisions in *Sinclair* and *Kungys*—is inapposite to the question whether materiality under statutes involving false statements or concealments directed at private persons is determined by the judge or the jury. *Staniforth*, 971 F.2d at 1358; *Hedgecock*, 795 P.2d at 1265-1267.

In particular, the court in *Staniforth*, while not ultimately deciding whether materiality in a bank fraud prosecution is a question of law, 971 F.2d at 1359, explained, *id.* at 1358:

> *Kungys* involved a false statement to a government agency * * *, and the tendency of a statement to mislead the government depends on its relevance to the criteria applied by the agency. * * * Relevance is a legal determination. Juries are told what is relevant; they do not make determinations of relevance. But the question whether a false statement to a bank or other business firm is capable of influencing the firm's decisions is no more a question of law than whether a false statement to a prospective investor is capable of influencing his decision to invest and therefore is material to that decision.

The court in *Hedgecock* found *Sinclair* and *Kungys* inapposite on similar grounds, and relied instead on this Court's decision in *TSC*, which, as discussed above, involved material concealments from private entities. See *Hedgecock*, 795 P.2d at 1267. Thus, far from supporting respondent, *Staniforth* and *Hedgecock* undermine his reliance on case law assigning the materiality determination to juries under statutes proscribing false statements to or for the benefit of private, rather than public, entities.

3. Respondent asserts that the Due Process Clause and the Sixth Amendment compel a jury determination of materiality because it is an element of the offense. Resp. Br. 27-39. The decisions on which he relies, however, do not assist in resolving the question before this Court.

a. In discussing "[t]he requirements of due process" (Resp. Br. 27), respondent summarizes several decisions of this Court in which criminal defendants challenged the way in which a State allocated the burden of proof at trial on a particular fact (*id.* at 27-29). As discussed in our opening brief, those decisions are inapposite, for they involved factual elements of crimes, not questions of law. U.S. Br. 38-39 & n.27. In any event, respondent relies on the decisions only to argue that it cannot be harmless error for a court to take from the jury an issue that the jury is constitutionally required to decide. Resp. Br. 29 & n.15. The harmless-error issue, however, is not before this Court.

b. Respondent's discussion of the constitutional right to a jury trial in a criminal case likewise is tangential to analysis of the question presented here. See Resp. Br. 30-34. He begins (*id.* at 30-31) by establishing "the interrelationship between the due

process reasonable doubt requirement and the Sixth Amendment right to have a jury decide every fact necessary for conviction" (*id.* at 31). We acknowledge that connection in our opening brief. U.S. Br. 36-37. Respondent ends (Resp. Br. 32-34) by repeating his harmless-error argument.

c. Finally, respondent argues (Resp. Br. 34-39), in accordance with the Ninth Circuit's reasoning (Pet. App. 10a-14a), that materiality must be determined by the jury because it is an element of the offense prescribed in Section 1001. Resp. Br. 34-35. Respondent appears to base that argument in part on what he regards to have been Congress's intent in enacting Section 1001. See, *e.g.*, Resp. Br. 39 ("the power of the legislature is not the issue; it is how that power was exercised which determines whether the jury must decide the issue").[4] As we explain in our opening brief, however, there is no evidence that Congress

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[4] See also Resp. Br. 36 (it is "strictly the domain of Congress to determine and define the essential elements of any criminal offense"), 37 ("[a]pplying the same principles of statutory interpretation" as applied in *United States* v. *Rodgers*, 466 U.S. 475 (1984), " 'materiality' can readily be interpreted and understood by jurors"), Resp. Br. 37 ("where Congress has designated materiality to be an essential element of an offense, as it has with false statement prosecutions brought pursuant to 18 U.S.C. § 1001, then the distinction between issues of fact and law have little relevance to the determination whether the element must be decided by the jury"), 38 ("What the Government fails to acknowledge is that Congress *did* include materiality in the false statement statute, making it an essential element that must therefore be submitted to the jury."), 43 ("Congress has expressed its view that materiality is an essential element of the false statement statute, and should not be prohibited from doing so by reliance on common law traditions incorporated through the *Sinclair* dictum.").

intended in Section 1001 to depart from the widespread and virtually unquestioned common law treatment of materiality in perjury prosecutions as an issue of law for resolution by the courts. See U.S. Br. 24. In the absence of such evidence, Congress is presumed to have adopted that tradition as part of the "cluster of ideas" surrounding the concept of materiality in analogous state and federal statutes. See *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

Respondent appears to argue that, regardless of congressional intent, the Constitution requires the jury to decide every issue on which liability for an offense depends. See Resp. Br. 34 ("[w]henever an issue is an essential element of a criminal offense, constitutional principles of due process and the right to a jury trial must take precedence"). Even the Ninth Circuit did not embrace so broad a position. On the contrary, it recognized that an element of a crime may permissibly be decided by the judge "as a matter of law * * * if the determination had no factual component at all." Pet. App. 12a.[5] While the

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[5] The Ninth Circuit has in fact resolved elements of crimes as a matter of law, even when the appraisal of facts did enter into the decision. See *United States* v. *Warren*, 984 F.2d 325, 327 (9th Cir. 1993) (district court "may determine as a matter of law the existence of federal jurisdiction over [a] geographic area"; jury determines where crime was actually committed); *United States* v. *Jackson*, 436 F.2d 39 (9th Cir. 1970) (determining as a matter of law whether a radio purchased with government funds and used in a federally subsidized club was "property of the United States" under federal stolen property statute), cert. denied, 403 U.S. 906 (1971). Other circuits follow the same approach. See, *e.g.*, *United States* v. *Hernandez-Fundora*, No. 93-1632, 1995 WL 62811 (2d Cir. Feb. 14, 1995) (whether a particular place is within the special

Constitution entitles a criminal defendant to have the jury decide the factual components of the elements of the offense with which he is charged, see U.S. Br. 33, the determination of whether a statement was "predictably capable of affecting * * * the official decision," *Kungys*, 485 U.S. at 771, is not a factual issue.

4. a. In our opening brief, we argue that the history of assigning materiality in perjury cases to the judge, rather than the jury, strongly supports its constitutionality. U.S. Br. 26-31. We explained that history is relevant in reviewing both due process challenges and challenges based on the constitutional right to a jury trial in a criminal case. *Ibid.*

Respondent observes that historical endorsement of a practice does not immunize it from due process review. See Resp. Br. 43-44; see also NACDL Amicus Br. 9-10. We agree. U.S. Br. 27. In our opening brief, however, we also show that the assignment of materiality to the jury does not offend the principle of due process articulated in *In re Winship*, 397 U.S. 358 (1970) (see U.S. Br. 31-40), or any other "recognized principle of 'fundamental fairness'" (*id.* at 40 (quoting *Medina* v. *California*, 112 S. Ct. 2572, 2578 (1992)). Respondent argues that "fundamental fairness" analysis is "primarily utilized with federal challenges to state procedures" (Resp. Br. 43), and he

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territorial jurisdiction of the United States is a question of law); *United States* v. *Howard*, 855 F.2d 832, 834 (11th Cir. 1988) (whether funds received by the defendant were reportable income in a tax prosecution is a question of law); *United States* v. *Guy*, 456 F.2d 1157, 1163 (8th Cir.) (whether Federal Reserve notes are "obligations of the United States" in a counterfeiting prosecution is a question of law), cert. denied, 409 U.S. 896 (1972).

suggests that it is "of questionable relevance" here (*id.* at 44 n.21). This Court, however, has undertaken that analysis in reviewing due process challenges to federal, as well as state, criminal procedures. See, *e.g.*, *Dowling* v. *United States*, 493 U.S. 342, 352-353 (1990) (admission of evidence at trial); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (preindictment delay).

Respondent errs in arguing that history has little bearing on whether a practice comports with the Constitution's jury trial guarantee. See Resp. Br. 40-43, 45. In support of that argument, respondent relies on *Williams* v. *Florida*, 399 U.S. 78 (1970), which upheld a state rule authorizing juries of fewer than 12 people in noncapital criminal trials. *Williams* makes clear that the Constitution does not require "every feature of the [criminal] jury as it existed at common law." *Id.* at 91. *Williams* does not address the quite different issue of under what circumstances the Constitution invalidates a common law feature of a jury. Elsewhere, this Court has indicated that the Constitution may require that a common law feature of a jury yield to changes in society's concept of the community, which the jury is designed to reflect. See *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1426 (1994) (equal protection bars gender discrimination in use of peremptory challenges); *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) (Sixth Amendment bars exclusion of women from jury). There has been no such change, however, in the customary view of materiality. See U.S. Br. 29-30; *e.g.*, *State* v. *Sands*, 467 A.2d at 215-216.

b. Respondent argues that "*Sinclair*'s foundation no longer rests on solid ground" because "this Court's interpretation of the right to a jury trial has

not remained static since * * * *Sinclair* was decided." Resp. Br. 45, 47; see also NACDL Amicus Br. 6-7. In holding that "pertinency" was properly determined by the judge rather than the jury, the Court in *Sinclair* reasoned that pertinency was analogous to two other sorts of determinations: a determination "concerning relevancy at the trial of issues in court," which the Court noted is "uniformly held * * * a question of law"; and a determination "as to materiality of false testimony charged as perjury," which also "is one for the court." 279 U.S. at 298, discussed in U.S. Br. 13. Now, as when *Sinclair* was decided, courts (not juries) determine whether evidence is relevant for purposes of admission at trial. See U.S. Br. 43 & n.30; see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796 & n.10 (1993). Similarly, courts continue to determine the materiality of allegedly perjured testimony; indeed, materiality determinations are made by the court, rather than the jury, in prosecutions for other offenses, besides perjury, involving false statements to public entities. See U.S. Br. 22 n.15, 30 n.22. Thus, the foundation of *Sinclair* is solid.

It does not matter that, after *Sinclair*, the Court addressed many other issues concerning a criminal defendant's right to a jury trial, such as whether the right attaches in state proceedings. See Resp. Br. 47 (citing, *inter alia*, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)). The only aspect of the right at issue here is a criminal defendant's entitlement to have the jury find every fact necessary to constitute the charged offense. See, *e.g.*, Resp. Br. 4, 27; Pet. App. 6a-9a. That principle was well-established when *Sinclair* was decided, as we explain in our opening brief (see

U.S. Br. 33-35), and it has remained constant, see *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2080 (1993). Indeed, the defendant in *Sinclair* invoked that principle unsuccessfully in arguing that "pertinency" under the statute at issue had to be determined by the jury. See U.S. Br. 34-35; see also *Taylor*, 693 F. Supp. at 838 n.21. Respondent himself states that the principle is "as old as the concept of the jury trial itself." Resp. Br. 40.[6]

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[6] Having held that pertinency is properly determined by the court, rather than the jury, the Court in *Sinclair* stated that a contrary holding "would be incongruous and contrary to well-established principles." 279 U.S. at 299. In connection with that statement, the Court cited (*ibid.*) *ICC* v. *Brimson*, 154 U.S. 447, 489 (1894), and *Horning* v. *District of Columbia*, 254 U.S. 135 (1920). Although respondent suggests (Resp. Br. 45-46) that parts of *Brimson* and *Horning* are no longer good law, he does not challenge the propositions for which the Court apparently cited those decisions in *Sinclair*. In *Brimson*, the Court determined that a duty to comply with an ICC subpoena depended in part on whether "the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation." 154 U.S. at 476. The Court went on to hold that the existence of such a duty "is manifestly not one for the determination of a jury" because it "is not one of fact, but of law exclusively." *Id.* at 488. Because of the similarity between the issue whether material sought by an ICC subpoena "relate[d] to the matter under investigation" by the ICC and the issue whether the question posed by a congressional committee was "pertinent" to the matter under investigation by the committee, the holding in *Brimson* that the former issue was one of law to be determined by the court supported the holding in *Sinclair* that the latter issue was likewise one of law to be determined by the court.

In *Horning*, the Court affirmed a criminal conviction despite the trial court's "regrettable peremptoriness of tone" in suggesting to the jury that it should return a guilty verdict. 254 U.S. at 138. Although respondent suggests (Resp. Br. 46-

c. Although respondent recognizes at one point that the principle on which he relies here long predated *Sinclair*, elsewhere he repeats the Ninth Circuit's mistake by treating the principle as originating in *In re Winship*, *supra*. See Resp. Br. 4, 47-48. Based on that error, he criticizes the lower courts for following *Sinclair* while "mak[ing] no mention of *Winship*." Resp. Br. 48. Because the principle that respondent attributes to *Winship* was already well-established when *Sinclair* was decided and was specifically raised in *Sinclair*, however, the lower federal courts have correctly determined that they are bound by *Sinclair*, especially in light of its reaffirmance in *Kungys*. See *United States* v. *Daily*, 921 F.2d 994, 1005-1006 & n.14 (10th Cir. 1990), cert. denied, 502 U.S. 952 (1991); see also *United States* v. *Paxson*, 861 F.2d 730, 732 (D.C. Cir. 1988); *United States* v. *Abadi*, 706 F.2d 178, 180 n.2 (6th Cir.), cert. denied, 464 U.S. 821 (1983).

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47) that *Horning* is no longer good law in light of later decisions stating that a trial court judge cannot direct a guilty verdict, Justice Holmes' opinion for the Court in *Horning* itself recognized that principle, but simply held that the trial court's suasion was not tantamount to a directed verdict. In any event, the Court in *Sinclair* presumably cited *Horning* for the unexceptionable statement that "the judge always has the right and duty to tell [the jury] what the law is upon this or that state of facts." *Horning*, 254 U.S. at 138.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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